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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78——

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E.I. DU PONT DE NEMOURS & COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners CALLMAN GOTTESMAN and PAUL J. PEYSER seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered January 18, 1978.

Opinions Below

The judgment of the Court of Appeals is not reported and is printed at A*9-A11 hereto. The decision of the district court is reported at 430 F.Supp. 1047 (1977) and is printed at A12 hereto. Earlier decisions in this case on the merits are reported at:

171 F.Supp. 661, 268 F.2d 194; 28 F.R.D. 325; 7 Fed.Rules Serv.2d 24a.2, Case 2; 221 F.Supp. 488, *cert.*

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* A— refers to appendix to this petition.

denied, 379 U.S. 940, 85 S.Ct. 321, 13 L.Ed.2d 351, *rehearing denied,* 382 U.S. 875, 86 S.Ct. 17, 15 L.Ed.2d 118; 222 F.Supp. 342, *cert. denied,* 379 U.S. 882, 85 S.Ct. 144, 13 L.Ed.2d 88; 279 F.Supp. 361, 401 F.2d 510; 414 F.2d 956; 310 F.Supp. 1257, 436 F.2d 1205, *cert. denied,* 403 U.S. 911, 91 S.Ct. 2208, 29 L.Ed.2d 689, *rehearing denied,* 404 U.S. 876, 92 S.Ct. 29, 30 L.Ed.2d 125; *Schiff* v. *Metzner,* 2 Cir., 331 F.2d 963, *cert. denied,* 379 U.S. 881, 85 S.Ct. 150, 13 L.Ed.2d 88.

The decisions sought to be reviewed—as distinguished from the decisions on the merits of this case which are cited in the immediately preceding sentence—denied petitioners reimbursement from General Motors Corporation* of counsel fees and expenses as shareholders of General Motors suing derivatively on its behalf for violation of fiduciary obligation under diversity jurisdiction and upon federal statutory grounds against E.I. du Pont de Nemours & Co.**

Jurisdiction

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). The entry of the Court of Appeals judgment (on consolidated appeals) was January 18, 1978, and timely Petitions for Rehearing with Suggestion for Rehearing En Banc were denied January 3, 1979. (A1-A8)

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* A Delaware Corporation, herein usually called "General Motors".

** Herein usually called "du Pont", also a Delaware Corporation.

Question Presented for Review

Whether federal courts may constitutionally frustrate and overrule Delaware Law (and law of other states) clearly articulated and repeated by its Supreme Court declaring that State's vigorous policy requiring reimbursement by Delaware corporations of counsel fees in derivative actions presenting "meritorious claims" on behalf of Delaware corporations, in this case pursued by shareholders of General Motors on its behalf under diversity jurisdiction accomplishing a compulsory judicial accounting by a third party including federal antitrust claims against the third party.

Necessarily included is whether such state policy may constitutionally be defeated where in addition petitioners have proved, and respondents now admit, the "establishment of a cause of action" under antitrust laws in favor of General Motors merely because treble damages were not recovered, even though this Court has built upon, incorporated and emphasized decisions of the several States including Delaware (*Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 395, note 22) to require award of counsel fees where the *sole* substantive claim was under a federal statute and a cause of action was "established", and even though no legal or equitable relief was obtained on behalf of the corporation.

Constitutional and Statutory Provisions Involved

This petition involves:

> "Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States"

as held in *Erie Railroad* v. *Tompkins,* 304 U.S. 64, 79 (1938).

Further, this case necessarily involves dereliction of duty by the General Motors Board of Directors under Section 141(a) of the Delaware General Corporation Law providing:

> §141. (a) The business and affairs of every corporation organized under this chapter shall be managed by *or under the direction of* a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation. (Italicized words added by Chapter 437, Laws of 1974, effective July 1, 1974)

Statement of the Case

Petitioners as shareholders seek reimbursement from General Motors* for legal fees and disbursements in a derivative action brought on behalf of General Motors.

Petitioners achieved a monumental compulsory judicial accounting in favor of General Motors under diversity jurisdiction and antitrust claims.

The Supreme Court of Delaware under which law General Motors is incorporated has in *Iroquois Industries, Inc.* v. *Lewis,* 318 A.2d 134 (1974) held that counsel fees in a derivative action must be awarded, *irrespective of the outcome,* where there is a "meritorious action" which Delaware holds to be an action having a " 'reasonable hope' of success", affirming what the Chancellor had expressed below (*sub nom., Lewis* v. *Scotten-Dillon Company,* 306 A.2d 755, at 756 (1973)):

> "Under the view I take of the case the central question is whether plaintiff had a 'meritorious claim.' . . . In other words, I am unable to find as a fact that the cancellation was induced by the litigation. However, that is not determinative of plaintiff's right to fees; cancellation, if shown, would be but an additional factor in determining the *amount* of any fee allowed." (emphasis added).
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> • • •
>
> "The rules to be applied when compensation is sought in a derivative action were reviewed by the Supreme Court in *Chrysler Corporation* v. *Dann,* Del.,

* The stark simplicity of our claim against *General Motors alone* would be more apparent if we had omitted du Pont as a respondent here. In the event General Motors' response to this petition does not preserve its rights to indemnity and damage from du Pont, then du Pont might assert it no longer has an interest herein.

223 A.2d 384 (1966). There Chief Justice Wolcott stated that to justify an allowance the action must have had merit at the time it was filed, and plaintiff must have had *'some'* factual basis for his charges. He then wrote (emphasis added):

'The crux of the matter is the meaning of the term 'meritorious action.' . . . A claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success. It is not necessary that factually there be absolute assurance of ultimate success, but only that there by some reasonable hope.'

See also *Palley* v. *McDonnell Company,* Del.Ch., 295 A.2d 762 (1972)."

Herein, the Court of Appeals correctly stated: "This has been an epic case" (A10), necessarily having " 'some' factual basis".

Petitioners contend that two years before this Court's divestiture decree* at a time when General Motors, side by side with du Pont in Chicago, was actively contesting divestiture, petitioners became absolutely entitled under Delaware Law to legal fees when a panel held, among other things, the "question" was "not whether this action should be stopped, but merely who *ought* most properly to press it forward" (emphasis added) (*Gottesman, et al.* v. *General Motors, et al.,* (2 Cir., June 18, 1959) 268 F.2d 194, 197-198). Two years into the "epic" the case was held "meritorious" within the meaning of Delaware law.

A year earlier, Chancellor Seitz in a derivative action had awarded counsel fees to a shareholder after dismissal

* *United States* v. *E.I. duPont de Nemours & Co., et al.,* 366 U.S. 316 (1961).

in *Saks* v. *Gamble,* 38 Del. Ch. 504, 154 A.2d 767 (1958). Defendant claimed that the action "conferred no real benefit upon Skogmo . . ." (154 A.2d 768).

Chancellor Seitz stated (769):

"* * * that at the time plaintiff commenced the action he was not unreasonable in assuming that Skogmo did not own Associates' common stock".

The Delaware Court held (760):

"My overall conclusion is that Skogmo, assuming that it always owned Associates' common stock, engaged in conduct which justified the filing of this action and justified its continued prosecution until the interrogatories were answered by Skogmo disclosing that it owned Associates' common stock. I find it unnecessary to decide whether in fact there was doubt about this ownership. *However, it does stand disputed that for the first time the matter has been removed from the area of possible substantial doubt. This is a benefit to the corporatio* . (emphasis added)

* * *

I therefore conclude that plaintiff is entitled to reimbursement for her attorneys and accountants for the benefit conferred".

"I conclude that the benefit which was conferred upon Skogmo by this action cannot be directly measured in dollars and cents. However, I am satisfied that it was of sufficient value to justify the allowance of reasonable fees."

Petitioners contend, in addition and wholly independently of Delaware Law, that in this derivative action for the benefit of General Motors for an accounting and to enforce

the antitrust laws as well, they become absolutely entitled to counsel fees from General Motors no later than August 1969 under *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) in that ". . . the determination of *what constitutes a cause of action* . . ." made "appropriate" the award of counsel fees at that time (See 396 U.S. at 390, n. 13, emphasis added).

In the first appeal on the merits, *Gottesman, et al.* v. *General Motors, et al.*, 414 F.2d 956 (1969)), the Court squarely made in this case the ". . . determination of what constitutes a cause of action . . ." in holding that the trial Court

> ". . . erred in deciding that a violation of Section 7 of the Clayton Act cannot support a private cause of action for money damages, and that [it] improperly restricted the scope and weight of the government's judgment in the first *du Pont* case as applied to the case at bar." (414 F.2d at 958-59)

When the reviewing Court, noting the continued violation, referred (414 F.2d at 964) to ". . . a real present danger of impairment of competition" it described the same quality of statutory standard as Mr. Justice Harlan's determination of ". . . a significant *propensity* to affect the voting process . . .". (396 U.S. at 384)

Thus, it was determined and established that the violation of Section 7 continued into and during the damage period. The violation did not stop "as of 1949" (414 F.2d at 965). Rather the "crux of the violation existed on June 3, 1957 . . . and continued to exist until after the Court decreed complete divestiture by du Pont in 1961." (414 F.2d at 964).

In short, peitioners contend that when respondents as defendants were relegated to reliance upon the not "clearly erroneous" standard of Rule 52(a), Fed. R.Civ.Pr., in two

appeals* after trial on the merits, they necessarily admitted *ipso facto*

a. a "meritorious action" on behalf of General Motors under Delaware Law with " 'some' factual basis", and

b. "establishing a cause of action" in favor of General Motors and all of its shareholders under the antitrust laws as held in *Mills, supra.*

Only upon remand did " . . . du Pont concede[.] that its stock interest in General Motors constituted a violation of §7 during the damage period" (310 F.Supp. 1257, at 1258). On the second appeal on the merits (436 F.2d 1205, at 1211, n.21) the Court noted the "established . . . violation of Section 7 of the Clayton Act".

Petitioners contend that for at least two decades they have been entitled to counsel fees from General Motors under Delaware Law.

Petitioners contend that for at least one decade they have been entitled to counsel fees from General Motors under *Mills, supra.*

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* 414 F.2d 956 (1969); 436 F.2d 1205 (1971).

REASONS FOR GRANTING THE WRIT

I.

The Decisions Below Flatly Overrule *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), as to the Internal Affairs of Corporations Without Express or Implied Grant from Congress.

The decisions below "'cover the corporate universe*'" to cripple Delaware Law and do so in circumstances to frustrate one of the strongest policies ever enacted by Congress.

Whatever may be any reservations in any circuit as to the *adequacy* of Delaware Corporate Law, such reservations do not furnish ground to overrule the strong remedial policies of that, or any other State, whether expressed in legislation or unequivocally by the highest Court of the State.

That was exactly what was done by the Courts below.

As discussed more fully hereinafter under *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 395, n.22 (1970) where Mr. Justice Harlan utilized the law of a number of states to demonstrate the importance of sustaining the derivative action where power and standing arise under state law, but where the substantive issue was *solely* a federal claim under the securities laws, the decisions below utilize the mere existence of antitrust claims to cripple the derivative action on behalf of a Delaware corporation, even as to diversity jurisdiction over compulsory accounting for the benefit of that Delaware corporation.

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* *Santa Fe Industries* v. *Greene*, 430 U.S. 462, 97 S.Ct. 1292, 1304 (1977), Note 17, quoting Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale Law J. 663, 700 (1974).

By contrast this Court's recognition of the constitutional command of *Erie Railroad, supra,* is accompanied by meticulous concern that state policies be neither disregarded nor frustrated, as held in *Aronson* v. *Quick Point Pencil Corporation* (No. 77-1413, Feb. 28, 1979) —— U.S. ——, 47 L.W. 4219, 4220 where this Court stated:

> "Commercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law. *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 479 (1974); see *Goldstein* v. *California*, 412 U.S. 546 (1973). In this as in other fields, the question of whether federal law pre-empts state law 'involves a consideration of whether that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 76 (1941).' *Kewanee Oil Co., supra.* If it does not, state law governs."

To sustain the decisions below would require a determination that the Delaware Supreme Court policy of reimbursing for counsel fees in derivative actions "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in enacting the antitrust laws.

Where Congress has deliberately encouraged full exercise of rights under the "charter of economic liberty" * by

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* "The Sherman Act was designated to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958); see also "the Magna Carta of free enterprise", *U.S.* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

awarding triple damages as a *specific* federal right, it cannot in any way be construed as having at the same time abolished *State* substantive law of corporations and standing to exercise that very federal right.

The confusion of both courts below arises from total failure to understand this Court's decision in *Ross* v. *Bernard,* 396 U.S. 531 (1970). There this Court noted that "the remedy made available in equity was the derivative suit. . ." (at 534) and then went on to state:

> "Thus the dual nature of the stockholder's action: first, the plaintiff's right to sue on behalf of the corporation and, second, the merits of the corporation claim itself." [5] (footnote omitted)

The effect of the decisions below is to hold that since money damages were not awarded in a suit *including* federal legal claims under the antitrust laws, that the successful compulsory judicial accounting where both the substance and the standing arose in Delaware defeats that State's, as well as all other States', law as expressed by its highest Court.

In short, this is the first case to hold in effect that the joinder of law and equity into a "civil action" may supplant the substance of the several States' corporation codes and their construction by their highest Courts.

The early expression of the Delaware rule two decades ago in *Saks* v. *Gamble, supra,* holding that it was a "*benefit* to the corporation" where "for the first time the matter has been removed from the area of *possible* substantial doubt" (emphasis added) does not begin to describe the exhaustive accounting where it is undisputed that while du Pont was in violation of the antitrust laws du Pont at the same time charged General Motors about a dollar a gallon more than

it charged other customers for the same or comparable products. The compulsory judicial accounting in this case as a bare minimum corrected the "*possible* substantial doubt" as to transactions between the parties.

To juxtapose this case to *Burks* v. *Lasker* (No. 77-1724, argued January 17, 1979) is to heighten the importance and meaning of its devastating effect upon the substantive corporation law of fifty states. It would have been hopeless for General Motors to attempt to obtain the advice of able and conscientious counsel to permit an independent quorum of its Board to make an informed and good faith judgment under Section 141(a) of the Delaware Corporation law to terminate this action.* Instead, while General

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* A few illustrative quotations from this Court here suffice:

"We held that du Pont's acquisition of the 23 percent of General Motors stock had *led to the insulation from free competition* of most of the General Motors market in automobile finishes and fabrics . . ." (366 U.S. 319); "The inference is overwhelming that du Pont's commanding position was *promoted by its stock interest* and *was not gained solely on competitive merit*" (353 U.S. at 605); "But the wisdom of this business judgment cannot obscure the fact, plainly revealed by the record, that du Pont *purposely employed its stock* to pry open the General Motors market *to entrench itself* as the primary supplier of General Motors' requirements for automotive finishes and fabrics" (353 U.S. at 606); that the "acquisition of the General Motors' stock, and *the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition . . .*" (353 U.S. at 589); that the result of the Government suit should "effectively *pry open to competition* a market that has been *closed by defendants' illegal restraints*" (366 U.S. at 323, quoting from *International Salt Co.,* 332 U.S. 392, 401); that "The key to the whole question of antitrust remedy is of course the discovery of measures *effective to restore competition*" (366 U.S. at 326); that it was necessary that there be *"dissolution of the intercorporate community of interest* which we found to violate the law" since if continued, this would "induce General Motors to favor du Pont, the *very result which we found illegal* on the first appeal" (366 U.S. at 331); and that over the years General Motors management "has become accustomed to du Pont's *special relationship*" (366 U.S. at 332). (Emphasis added.)

Motors was simultaneously fighting side by side with du Pont in 1959 in Chicago to prevent divestiture of du Pont's 23% voting stock interest, it joined with du Pont to move to dismiss this case under former Rule 23(b) for failure to make demand on *stockholders,* but as noted in this first appeal (268 F.2d 194, 195 (1959))

> "No *attempt* is made to attack corresponding allegations of paragraphs 7 and 20 excusing a lack of like demand upon the *Board of Directors of General Motors.*" (emphasis added)

After the 1961 divestiture decree General Motors did not obtain outside counsel to advise it as to the merits or to assist petitioners. Rather, it continued to fight this case solely through staff (and retired staff) counsel with the full resources at its command, even to the point of joining du Pont in urging in 1963 that since General Motors did not claim injury in the *government* suit, petitioners were precluded from taking an inconsistent position.

The General Motors Board deliberately chose to have the corporation's own burden and own duty to compel the accounting by the lawbreaker accomplished by shareholders on its behalf rather than by the corporation itself. That compulsory accounting proved that du Pont obtained higher prices and higher profit margins on sales to General Motors than on sales of the same and comparable products to other automotive manufacturers where a du Pont executive testified *"The competitive situation would not allow that kind of price".*

The decisions below reduce the law of this case (i.e., ". . . merely who *ought* most properly to press it forward" (268 F.2d at 197-198)) to a mere attractive nuisance, and diminish two appeals on the merits where respondents were compelled to rely on the not "clearly erroneous" doctrine to a level less than "meritorious action" under Delaware law,

thereby in effect holding that this "epic case" should have been strangled at birth and dismissed at the threshold for lack of " 'some' factual basis".

The District Court did not discuss Delaware law. The Court of Appeals misconstrued Delaware law as requiring "relief granted" (A 11), which Delaware makes clear bears only on the *amount* of counsel fees to be awarded in a "meritorious case".

In any event, the full remedy of a compulsory judicial accounting is as much "relief granted" as an injunction.

II.

The Decisions Below Reduce *Mills* v. *Electric Auto-Lite Co.* to Alice's "Grin Without a Cat".*

Mills, supra, in "acknowledg[ing] that a corporation may receive a " 'substantial benefit' from a *derivative* suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature" " (396 U.S. at 395) relied in note 22 upon cases of California, Delaware, Hawaii, Iowa, Minnesota, New York and a federal court.

Where Congress has provided treble damages under antitrust laws, the *importance* cannot be less than the single actual damage under securities laws where ". . . the stress placed by Congress upon the *importance* of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders" (396 U.S. at 396, emphasis added).

Neither legal nor equitable relief was ever awarded in *Mills,* there being no proof of ". . . reduction of the earn-

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* Lewis Carroll, "Alice's Adventures in Wonderland", Chapter VI, "Pig and Pepper", penultimate paragraph, any edition.

ings or earnings potential of their holdings" (396 U.S. at 389) as held seven years later (7 Cir., 1977, 552 F.2d 1239, cert. den. —— U.S. ——, 98 S.Ct. 398 (1977)).

However evanescent the *Mills* Cheshire Cat and however immanent the grin, the Court of Appeals was egregiously wrong in stating (A 11).

> "In *Mills* there was relief granted whereas here there was no relief obtained at all either by way of injunction or by way of damages".

The district court was equally wrong in stating that in *Mills* ". . . the *exact* relief had not been determined". (A 17, emphasis added)

This Court held that attorneys' fees should be awarded merely for "establishing the violation" (396 U.S. at 390) which petitioners accomplished no later than the first appeal on the merits (414 F.2d 956 (1969)), and it was only a *further* award which would await the final outcome, this Court declaring (396 U.S. 390, n.13) that it was only additional "future" legal expenses that need await determination of the "issue of relief" and held (396 U.S. 396-397):

> "Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a *further* award should later be made. But *regardless of the relief granted,* private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish *a benefit to all shareholders* by providing an important means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that *would have had to pay them had it brought the suit.*" (Footnote omitted, emphasis added)

In short, *Mills,* on the basis of state law, including the Delaware decision of Chancellor Seitz in *Saks* v. *Gamble, supra,* cited by Mr. Justice Harlan in his note 22, furthered the policies of states in derivative actions to include claims on behalf of corporations *solely* for violations of federal statutes pursued in federal courts.

III.

Both Courts Below Ignored the Derivative Nature of This Case to Treat *Alyeska Pipeline Co.* v. *Wilderness* Society, 421 U.S. 240 (1975) as Overruling *Erie* and *Mills.*

The opinion in *Alyeska, supra,* expressly reaffirmed the right in derivative suits to recover counsel fees ". . . . directly from the other parties enjoying the benefit". (at 257, citing *Mills, supra,* among others).

Further, where compulsory judicial accounting is obtained under diversity counts for violation of *state* fiduciary obligation this Court's note 31 in *Alyeska* (421 U.S. at 259) printed below could serve as a brief requiring summary reversal herein:

> "31. A very different situation is presented when a federal court sits in a diversity case. '[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving right thereto, which reflects a substantial policy of the state, should be followed.' 6 J. Moore, Federal Practice ¶ 54.77[2], pp. 1712-1713 (2d ed. 1974)

(footnotes omitted). See also 2 S. Speiser, Attorneys' Fees §§ 14:3, 14:4 (1973) (hereinafter Speiser): Annotation, Prevailing Party's Right to Recover Counsel Fees in Federal Courts, 8 L.Ed.2d 894, 900-901. Prior to the decision in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), this Court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts: '[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts." People of Sioux County v. National Surety Co., 276 U.S. 238, 243, 48 S.Ct. 239, 241, 72 L.Ed. 547 (1928). The limitations on the awards of attorneys' fees by federal courts deriving from the 1853 Act were found not to bar the award. *Id.*, at 243-244, 48 S.Ct., at 241. We see nothing after *Erie* requiring a departure from this result. See Hanna v. Plumer, 380 U.S. 460, 467-468, 85 S.Ct. 1136, 1141-1142, 14 L.Ed. 2d 8 (1965). The same would clearly hold for a judicially created rule, although the question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule. See 1 Speiser §§ 12:3, 12:4."

The district court held (A 18) "The decision in *Alyeska* completely forecloses any recovery here". The Court of Appeals also found (A 10) "the applicable rule . . . is . . . *Alyeska* v. *Wilderness Society*". It proceeded contrary to

Delaware law and *Mills* while recognizing that ". . . plaintiffs *did* succeed in obtaining an accounting from du Pont, nothing was found to be due"; nevertheless, the Court failed to recognize that both under both Delaware law and *Mills* this would relate only to the *amount* of fee to be recovered—not to the *right* to recover. In the next sentence the Court of Appeals ignored the "establishment of a cause of action" in what it had called an "epic case", which it misdescribed as "just the clarification of some principles of law". (A 11)

To "establish[.] . . . a violation of Section 7 of the Clayton Act" (436 F.2d at 1211, n.21) is surely at least to bring a derivative "meritorious action" under Delaware Law.

To treat the statutory rights of shareholders under Delaware Law the same as a volunteer, modern day Thoreau under *Alyeska* is to rebuild *Swift* v. *Tyson*, 16 Pet. 1, 41 U.S. 1 (1842) on fragile tundra.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

March 15, 1979

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of January, one thousand nine hundred and seventy-nine.

Present:

HON. LEONARD P. MOORE,
HON. WALTER R. MANSFIELD,

Circuit Judges.

77-7228
77-7428

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION and
E.I. DU PONT de NEMOURS & COMPANY,

Defendants-Appellees,

CLENDON H. LEE,

Appellant.

Opinion of the Court of Appeals

A petition for a rehearing having been filed herein by appellant Clendon H. Lee, pro se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

Judge Smith took no part in consideration of the question whether to grant rehearing.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro, Clerk

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of January, one thousand nine hundred and seventy-nine.

77-7228
77-7428

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION and
E.I. DU PONT de NEMOURS & COMPANY,

Defendants-Appellees,

CLENDON H. LEE,

Appellant.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by appellant Clendon H. Lee, pro se, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Opinion of the Court of Appeals

Ordered that said petition be and it hereby is denied.

Judge Smith took no part in consideration of the question whether to grant rehearing en banc.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN, Chief Judge

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of January, one thousand nine hundred and seventy-nine.

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77-7228
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CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION and
E.I. DU PONT de NEMOURS & COMPANY,

Defendants-Appellees,

CLENDON H. LEE,

Appellant.

Opinion of the Court of Appeals

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Judge Smith took no part in consideration of the question whether to grant rehearing.

/s/ A. Daniel Fusaro
A. Daniel Fusaro, Clerk

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of January, one thousand nine hundred and seventy-nine.

77-7228
77-7428

Callman Gottesman and Paul J. Peyser,

Plaintiffs-Appellants,

v.

General Motors Corporation and
E.I. du Pont de Nemours & Company,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for plaintiffs-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Opinion of the Court of Appeals

Ordered that said petition be and it hereby is denied.

Judge Smith took no part in consideration of the question whether to grant rehearing en banc.

/s/ Irving R. Kaufman
Irving R. Kaufman, Chief Judge

Opinion of the Court of Appeals

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS

For the Second Circuit

Dkt. No. 77-7228

Callman Gottesman and Paul J. Peyser,

Plaintiffs-Appellants,

—against—

General Motors Corporation and
E.I. du Pont de Nemours & Company,

Defendants-Appellees,

Clendon H. Lee,

Appellant.

Before:

Hon. Walter R. Mansfield, Leonard P. Moore
and J. Joseph Smith,

Circuit Judges.

New York, N.Y.
January 18, 1978

Statement made by the court at disposition of appeal in open court.

We have read the briefs and reread them and we have looked at the record and read Judge Metzner's opinion. This has been an epic case. It has required countless hours of expert professional services by eminent counsel and an enormous outlay in expenses. The services have been rendered over what seems like an interminable period of time, rivaling *Jaundice* v. *Jaundice.** I imagine it would have seemed even more interminable 18 years ago if we knew it was going to extend as long as this. There is no question about the fact that the litigation has involved complex facts and difficult questions of law.

In accordance with our custom, when the rule of law and its applicability to the facts of the case are clear and a written opinion would not contribute anything of precedential value, we are going to dispose of this case now, from the bench. We recognize all of the factors that you and other plaintiffs' counsel have mentioned. We sympathize with your position, in view of all the work you have done. But we feel that we must affirm here essentially for the reasons stated by Judge Metzner in his opinion, because it seems to us that the applicable rule here is the American Rule as it has been explained by the Supreme Court in *Alyeska* v. *Wildnerness Society.* That Rule requires each litigant to bear his own costs and expenses of litigation, absent some exception permitting recovery from others, such as a statutory authority, the creation of a fund, a contract or agreement for a fee, a showing of bad faith or misconduct on the part of the other side, or a benefit to the client.

Applying these principles here, we find no statutory authority for an award. Section 4 of the Clayton Act entitles a party to recover counsel fees only if there is a

* Sic

recovery of damages and here there was none. We find no benefit to the defendants of a nature that warrants an award of counsel fees. While it may be true that the plaintiffs did succeed in obtaining an accounting from duPont, nothing was found to be due. To recover attorneys fees there must be more than just the clarification of some principle of law. The cases relied upon such as *Saks* v. *Gamble* and *Mills* v. *Electro** *Auto Light* are clearly distinguishable. *Saks* is somewhat sui generis because of the fact that there was concealment or nondisclosure of the parent-subsidiary relationship between the parties and there was the clandestine interest of the parent in the independent firm that was eventually disclosed. In *Mills* there was relief granted whereas here there was no relief obtained at all either by way of injunction or by way of damages. We find no basis for an award of attorneys fees to the loser. There is no showing of bad faith on the part of the defendants, no agreement that covers an award of a fee regardless of how the case might come out, and no creation of a common fund.

Absent some exception to the American Rule that would entitle counsel here to a fee, we must affirm, as I said, essentially for the reasons stated by Judge Metzner in his opinion.

* Sic

(Reported 430 F.Supp. 1047)

Opinion of the District Court

UNITED STATES DISTRICT COURT

S. D. New York

Civ. A. No. 121-251 (CMM)

April 12, 1977

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION and
E. I. DUPONT de NEMOURS & COMPANY,

Defendants.

Counsel for plaintiffs in unsuccessful derivative stockholders action sought an award of attorney fees and disbursements and expenses. The District Court, Metzner, J., held that under the circumstances plaintiffs' counsel were not entitled to award of attorney fees or costs and expenses.

Motion denied.

Counsel for plaintiffs in unsuccessful derivative stockholders' action in antitrust suit were not entitled to award of attorney fees and disbursements and expenses in view of showing, inter alia, that no tangible benefit had been conferred on a defendant by institution of the action, no fund existed as result of counsel's activity to which a fee could be attached, and statutory recovery is governed by

provision of Clayton Act which conditions allowance on the entry of judgment in favor of the plaintiff for treble damages, and there had been no common benefit achieved to justify allowance under exception to the general "American rule" that prevailing party may not recover attorney fees as costs or otherwise. Clayton Act, § 4, 15 U.S.C.A. § 15.

Netter, Dowd, Ness, Alfieri & Stern, New York City, for plaintiffs; Richard M. Netter, Henry L. Bayles, New York City, of counsel.

William A. Grier, Edward B. Wallace, New York City, for defendant General Motors Corp.; Frazer F. Hilder, Calvert Thomas, Detroit, Mich., John J. Higgins, New York City, of counsel.

Covington & Burling, Washington, D.C., for defendant E. I. duPont de Nemours & Co.; Daniel M. Gribbon, Harris Weinstein, Washington, D.C., of counsel.

METZNER, District Judge:

Counsel for plaintiffs in this unsuccessful derivative stockholders' action seek an award of $1,000,000 as counsel fees and $345,059.94 for disbursements and expenses. The claim is directed against both General Motors Corporation (General Motors) on whose behalf the antitrust suit was prosecuted, and E. I. duPont de Nemours & Company (duPont), the prime defendant.

The court has received neither a proper affidavit of services nor an itemization of the amount requested as disbursements. *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448 (2d Cir. 1974). While the court has extensive knowledge of the litigation, this knowledge only goes to

the nature and extent of the legal services rendered, not to the amount and propriety of the claimed disbursements. However, this omission does not affect the determination of the application, which must be denied.

On October 1, 1959, the day following my induction as a judge of this court, I acceded to the request of the then Chief Judge Sylvester J. Ryan to become the Rule 2 judge[1] in what he described as a "fascinating case." [2] Now, nearly eighteen years later, it appears that the end has been reached with the making of this application at the foot of the judgment of dismissal that was entered on January 23, 1976.

The litigation was bitterly fought, as can be seen by the published reports.[3] However, all came to naught when the final judgment after trial dismissing two of plaintiffs' claims was affirmed on appeal, and certiorari was denied.

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[1] Rule 2 of the rules of this court, under the master calendar system which was in operation at the time, provided that a complicated case requiring prolonged attention of the court could be assigned for all purposes by the Chief Judge to one of the judges of the court.

[2] The Chief Judge was correct in so labelling the case, but I never dreamed that his characterization would include the span of active service of a judge, the death of four of the twenty counsel involved on plaintiff's side, the passage of the tenure of five successive general counsels of General Motors, and the elevation to chief executive officer of duPont of one of its counsel.

[3] 171 F.Supp. 661, 268 F.2d 194; 28 F.R.D. 325; 7 Fed. Rules Serv.2d 24a.2, Case 2; 221 F.Supp. 488, *cert. denied,* 379 U.S. 940, 85 S.Ct. 321, 13 L.Ed.2d 351, *rehearing denied,* 382 U.S. 875, 86 S.Ct. 17, 15 L.Ed.2d 118; 222 F.Supp. 342, *cert. denied,* 379 U.S. 882, 85 S.Ct. 144, 13 L.Ed.2d 88; 279 F.Supp. 361, 401 F.2d 510, 414 F.2d 956; 310 F.Supp. 1257, 436 F.2d 1205, *cert. denied,* 403 U.S. 911, 91 S.Ct. 2208, 29 L.Ed.2d 689, *rehearing denied,* 404 U.S. 876, 92 S.Ct. 29, 30 L.Ed.2d 125; *Schiff* v. *Metzner,* 2 Cir., 331 F.2d 963, cert. denied, 379 U.S. 881, 85 S.Ct. 150, 13 L.Ed.2d 88.

No tangible benefit has been conferred on General Motors by the institution of this action. No fund exists as the result of counsel's activity to which a fee can attach. Despite this, the court is urged to allow the fee because "Gottesman has indeed been an unusual and challenging case spanning some nineteen years. . . . In view of the particular and unique aspects of this case—which may fairly be considered *sui generis*—we respectfully request that the Court should exercise the broad equitable jurisdiction vested in it and grant plaintiff's application." There is no doubt that the case presented unusual and challenging aspects. There certainly was professional satisfaction for the court and I am sure for the lawyers involved in the litigation. However, the defendants cannot be called upon to pay for such satisfaction.

Applicants urge that the action was instituted in good faith, that it had to be instituted after the government obtained divestiture by duPont of General Motors' stock, that the institution and continuance of the action received judicial approval, that the services rendered benefited General Motors stockholders, stockholders in general, and the general public, and also served a therapeutic corporate purpose.

There is no doubt that the action was started in good faith. In fact, as the Court of Appeals pointed out, the institution of such an action was a foregone conclusion after entry of the government judgment. 268 F.2d 194, 198.

The statement that the court approved the institution and continuance of the action is not quite accurate. Motions to dismiss were denied, and the right of plaintiffs to maintain the action was sustained. Such rulings are not to be interpreted as affirmative approval of the continuance of the lawsuit in the context urged by petitioners.

It is not clear as to what is meant by the contention that each of the various categories of services benefited General Motors' stockholders, stockholders generally, or the general public. I gather that counsel is taking the position that it was necessary to "air" the relationship between General Motors and duPont. Frankly, such an "airing" was made by the government in the divestiture suit years before.

Complaint is made that General Motors joined up with duPont to resist plaintiffs' claim. The result of the litigation shows that they properly resisted plaintiffs' claim. If the plaintiffs had been successful in proving that wrongdoing existed, the recovery could well have been astronomical, overshadowing any recovery ever received in any litigation in the history of this country. This could well have justified the expenditure of $345,059.94 for disbursements. However, the finding by this court dismissing the claims after trial was to the effect that duPont's stock control of General Motors did not, in fact, result in injury to General Motors.

Lastly, it is claimed that this action by the plaintiffs served a therapeutic corporate purpose. I know of no change of activity or conduct that was brought about as the result of the institution and prosecution of this lawsuit. If it is the contention that counsel fees are appropriate simply because initially there may have been some justification for bringing the lawsuit, it presents a novel basis for recovery. Where, for example, is the line to be drawn in weighing the propriety of initiating litigation, assuming the existence of good faith, before the court should allow fees for the unsuccessful class representative? A policy of payment based only upon a showing of tangible benefit, not merely an airing of the activity, is the only proper one to be followed.

The trial of this lawsuit was initially limited to automotive fabrics and finishes, with other product lines such as Freon 12 and tetraethyl lead to be left for another day. It was assumed that since automotive fabrics and finishes were the subject matter of the government trial and judgment, the case could be most easily proven, if at all, as to these products. The trial ended in a judgment for defendants. The plaintiffs have stipulated that it would not be in the best interests of General Motors' stockholders to continue either the open claims in this case, or the entire *Schiff* case. The latter case, held in abeyance pending the determination in *Gottesman,* had been instituted in 1963 in an attempt to overcome a finding in *Gottesman* that the statute of limitations barred the claims in that case from going back beyond May 1959.*

There has been some reliance placed on the language in *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 389, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). It must be borne in mind that the issue there was whether a fee should be allowed plaintiffs' counsel for establishing a violation of the securities law. A benefit had been conferred by the services even though the exact relief had not been determined. Similarly, in *Kopet* v. *Esquire Realty Company,* 523 F.2d 1005 (2d Cir. 1975), the court found that the "assessment of such fees to a group of beneficiaries may be predicated on the conferral of benefits which are neither monetary in nature nor explicitly sought on behalf of the entire group." It was found that the corporation benefited from plaintiff's action "both in arresting an existing violation of the law and in the deterrent effect which it may be assumed the action will have on the future conduct of Esquire management." In both of these cases, which employ broad lan-

* Sic, should read 1950.

guage concerning the right of counsel to compensation from the corporation, there existed an ascertainable benefit to the corporation resulting from plaintiffs' efforts. The only issue in this litigation was whether General Motors had been injured by duPont's actions in the past. The ability to inflict such injury in the future was precluded by the judgment in the government's suit calling for divestiture of duPont's holdings in General Motors.

Finally, there exists neither statutory authority nor any exception to the "American rule" that the prevailing party may not recover attorneys' fees as costs or otherwise. Actually, the basis for the requested compensation in this case is similar to that urged in *Alyeska Pipe Line Co.* v. *Wildnerness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). The decision in *Alyeska* completely forecloses any recovery here. The instant action was an antitrust case in which plaintiffs were cast in the role of the private attorney general. There is no doubt that this role is relied on heavily as a matter of policy in the enforcement of the antitrust laws. However, statutory recovery is governed by Section 4 of the Clayton Act which conditions the allowance on the entry of a judgment in favor of the plaintiff for treble damages. Also, there has not been a common benefit achieved here to justify an allowance under the exception to the general "American rule."

Motion denied.

So ordered.